No. SC95473

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

LEDALE NATHAN,

Appellant.

Appeal from St. Louis City Circuit Court
Twenty-Second Judicial Circuit
The Honorable Robert H. Dierker, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF FACTS

This is an appeal from a judgment entered by St. Louis City Circuit Court after a resentencing proceeding, which involved a juvenile offender, that took place after this Court's remand in *State v. Nathan*, 404 S.W.3d 253 (Mo. banc 2013).

In April 2010, Defendant was jointly charged with codefendant Mario Coleman with numerous criminal offenses committed during an October 5, 2009 home-invasion robbery when Defendant was a 16-year-old juvenile; these offenses resulted in the shooting death of Gina Stallis and multiple gunshot wounds to Nicholas Keonig and off-duty police officer Isabella Lovadina. (L.F. 27–36).[1] Defendant and Coleman were charged in a 26-count indictment with 1 count of first-degree murder, 2 counts of first-degree assault, 4 counts of first-degree robbery, 1 count of first-degree burglary, 5

[1] The record in this case consists of the transcript (Tr.) and legal file (L.F.) from Defendant's first trial in 2011, and the legal file (2nd L.F.) and transcript (2nd Tr.) from Defendant's resentencing proceeding following the remand by this Court in *Nathan*.

counts of kidnapping, and 13 counts of armed criminal action (ACA). (L.F. 27–36). Defendant's case was later severed from Coleman's.[2] (L.F. 22).

A jury trial was held April 4-11, 2011, with Judge Robert H. Dierker presiding. (L.F. 19–21). The jury found Defendant guilty on all 26 counts. (L.F. 17–19). The facts related to these offenses are recounted in this Court's opinion in Defendant's direct appeal from that trial:

> Shortly after midnight on October 5, 2009, Nathan and his accomplice, Mario Coleman, emerged from a vehicle and approached off-duty police officer Isabella Lovadina and Nicholas Koenig, who were standing in front of the house where Koenig's grandmother Ida Rask lived. Nathan was carrying a "silver" pistol, and Coleman was armed with a "black" pistol. Both pointed their guns at Lovadina and Koenig, ordering them to turn over their belongings. Nathan and Coleman forced the two inside the Rasks' house. At the time, Rask, her two daughters Rosemary Whitrock and Susan Koenig (Nicholas' mother), Whitrock's daughter Gina Stallis, and Stallis' two young children all were sleeping in the house. Coleman held Lovadina and Koenig at gunpoint while Nathan rounded up the remaining victims on the second floor, including Gina Stallis.

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[2] Coleman's convictions on these charges were affirmed by the Court of Appeals. *See State v. Coleman*, 407 S.W.3d 651 (Mo. App. E.D. 2013).

Nathan and Coleman took jewelry from the dressers and jewelry boxes, removed jewelry from the victims, and took money from purses. Both Nathan and Coleman threatened to kill several victims, including specifically Stallis and Whitrock, and emphasized these threats by pointing their guns in the victims' faces. Nathan ordered Stallis, at gunpoint, to carry a large television down from the second floor. A short time later, he ordered Stallis to go to the basement. Stallis turned on a light as she walked toward the basement, but Nathan immediately told her to turn it off. Seeing that Nathan was herding the victims into the basement (where they might be executed or assaulted further), Officer Lovadina moved toward the hallway where the basement door was located and offered to go to the basement instead of Stallis. Coleman moved to stop Lovadina, bringing the two of them—and Koenig, Stallis and Nathan—together in close proximity to each other in or near the hallway near the basement door.

At this point, Officer Lovadina charged Coleman in an attempt to disarm him. Nathan moved to help Coleman ward off Lovadina but was attacked by Koenig. Seven gunshots were heard during this brief fight, which ended with the shooter firing the final shots directly into Lovadina

as she lay on the floor.[3] Nathan and Coleman fled, abandoning Lovadina and Koenig, who had been hit five and three times respectively, and Stallis, who lay dead from a single gunshot wound in her chest.

Coleman took Nathan to the hospital because he had been shot in the hand during the melee. There, Nathan told the x-ray technician to get rid of the red "hoodie" that Nathan had been wearing during the robbery. Nathan lied to the police about his gunshot wound, giving incomplete and contradictory answers to their questions. Outside the hospital, the police approached Coleman, who attempted to throw away the black pistol and several items of jewelry taken from the victims. The police found Nathan's silver pistol, with an empty 7–shot clip, in Coleman's car. Nathan's DNA was found on the grip of this pistol, and Officer Lovadina's blood was found spattered on the outside and inside of the barrel. All of the bullets removed from Lovadina and Stallis, and the seven shell casings found in the hallway of the home, came from this silver pistol.

Nathan, 404 S.W.3d at 257–58.

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[3] During the penalty-phase trial that is the subject of this appeal, the parties agreed that Coleman was the only person who fired any shots. (Tr. 8–9, 273–74).

Since a sentence of life without parole was mandated by the first-degree-murder statute then in effect, Defendant chose to waive jury sentencing. (L.F. 9). Before sentencing Defendant, the trial court dismissed on jurisdictional grounds four counts of the indictment (Counts IX, X, XXXIII, and XXIV) pertaining to victim Rosemary Whitrock. (L.F. 17). The circuit court then imposed consecutive sentences of life without parole on the first-degree murder charge, life imprisonment for each count of first-degree assault and first-degree robbery, 15 years for each count of kidnapping, and 15 years for first-degree burglary. (L.F. 212). The life sentences the court imposed on the armed-criminal-action counts were ordered to run concurrently with their associated charges. (L.F. 212).

While Defendant's appeal was pending, the United States Supreme Court held in *Miller v. Alabama* that the Eighth Amendment prohibits the imposition of a statutorily mandated sentence of life without parole on juveniles who commit murder. (L.F. 213). While this Court upheld Defendant's conviction for first-degree murder, it set aside Defendant's mandatory life-without-parole sentence and remanded the case to the trial court so it could hold a sentencing proceeding that complied with *Miller*. (L.F. 213, 224). The Court also set aside the trial court's dismissal of the counts pertaining to victim Whitrock and, since the jury had already found

Defendant guilty of those counts, it remanded those counts to the trial court only for sentencing. (L.F. 224).

During the punishment-phase proceeding following this remand, the State put on essentially the same evidence that it had presented during the first trial, with the addition of some victim-impact testimony, so the newly impaneled jury could assess the circumstances of the offenses for sentencing purposes. This included the following evidence:

Just after midnight on October 5, 2009, Nick Koenig and Isabella Lovadina, who was an off-duty St. Louis City police officer, were standing on the sidewalk in front of Koenig's grandmother's (Ida Rask's) three-story house when a black car sped by them and turned around with its tires squealing. (Tr. 285, 289, 350–51, 355). Koenig and Lovadina were then quickly approached by two men coming from the direction where the car had gone. (Tr. 356, 419). Mario Coleman was wearing a black-hooded sweatshirt (hoodie) and carrying a silver gun, and Defendant was wearing a red hoodie and carrying a black gun. (Tr. 357, 385–86, 419). Both men pointed their guns at Koenig and Lovadina and ordered them to give up their property. (Tr. 357–58, 420). Lovadina said she did not have anything, and Koenig surrendered his wallet. (Tr. 358).

The robbers then asked who was in the house. (Tr. 358). Inside were Koenig's 77-year-old grandmother (Ida Rask), Rask's two daughters

(Rosemary Whitrock and Susan Diane Koenig—Nick Koenig's mother), Whitrock's daughter (Gina Stallis), and Stallis's two young sons. (Tr. 286, 288–89, 570–72). Koenig informed them that only women and children were inside. (Tr. 358, 420–21).

The robbers forced Koenig and Lovadina inside at gunpoint. (Tr. 358–59). Once inside, the robbers turned off the lights. (Tr. 359). When Lovadina told the robbers to take whatever they wanted, Coleman told her to turn around and get on the floor. (Tr. 359). Lovadina and Koenig got on the floor, and Defendant went upstairs. (Tr. 359–61, 421, 423). Coleman leaned down and asked Lovadina if she was sure that she did not have anything; he then grabbed Lovadina's butt in a sexual way. (Tr. 364). Whenever Lovadina or Koenig lifted their heads, they were told to put them down or else they would be killed. (Tr. 362, 422).

Rosemary Whitrock, who was sleeping upstairs, was awakened by the sound of her terrified daughter (Gina Stallis) crying. (Tr. 292–93). Defendant then pointed a gun at Whitrock's head. (Tr. 293). The robbers eventually ended up in Rask's bedroom and ordered her to take off her necklaces, ring, and watch. (Tr. 578, 584–86). Whitrock surrendered two jewelry boxes and some money she had in her purse. (Tr. 577, 592).

Defendant ordered Stallis to pick up a large flat-screen television on the second floor and carry it downstairs to the first floor. (Tr. 295–96). When

Whitrock attempted to help her daughter, who was having difficulty lifting the television, Defendant angrily refused to allow her to do so. (Tr. 339). Stallis, who was hunched over and crying, was forced to carry the television downstairs while Defendant screamed threats to kill her and pointed a gun at her. (Tr. 362–63, 424). Defendant was the more aggressive robber, and he acted particularly aggressive toward Stallis. (Tr. 307–08, 425).

Stallis repeatedly asked Defendant and Coleman whether she could check on her children, but they refused to let her. (Tr. 365, 426). While Rask was sitting on the stairs, Defendant pressed a gun on Rask's forehead and repeatedly threatened to kill her. (Tr. 301-02, 340, 366, 579). Coleman eventually told Defendant to get the gun out of Rask's face. (Tr. 366–67).

After discovering that there was a basement, Defendant ordered Stallis to get up and go in the basement; the robbers also said that everyone was going to the basement. (Tr. 367–68, 428). When Stallis got up to go to the basement, she turned the light on; Defendant yelled at her to turn it off. (Tr. 303–04). Whitrock told Stallis not to go into the basement. (Tr. 410).

Lovadina then got up and told Stallis to stay upstairs and that she would go downstairs into the basement. (Tr. 369, 428). Fearing that she and Stallis would be raped and everyone killed if they went into the basement, Lovadina rushed Coleman in an effort to disarm him. (Tr. 303, 369–70, 410, 428). As Defendant ran toward them, Koenig stopped him and a struggle between

them ensued. (Tr. 304, 429). Multiple gunshots were fired and Lovadina fell in pain to the floor. (Tr. 370). Coleman fired shots into Lovadina while she lay on the floor. (Tr. 431). Defendant and Coleman then fled. (Tr. 430).

Lovadina was shot five times. (Tr. 378). Her cheek was grazed by one bullet, she was shot twice in the chest, a fourth bullet went through her upper chest and shoulder, and a fifth bullet entered her upper thigh, went through her uterus, and lodged in her pelvis. (Tr. 378). Koenig was shot three times in the throat, shoulder, and back of the neck. (Tr. 430, 434–35). Stallis lay dead on the floor with a gunshot wound to the chest. (Tr. 569).

Defendant, who was shot in the left hand, was taken by Coleman to the hospital. (Tr. 498, 738). Defendant asked an X-ray technician to discard his red hoodie, which had blood on it; the hoodie was later found in a hospital laundry cart. (Tr. 499–503).

Defendant told police at the hospital that he had been shot while with his girlfriend. (Tr. 509–11). He later added that he had been shot while driving his car. (Tr. 511). When an officer pointed out that Defendant had not initially mentioned anything about being in a car, Defendant became nervous and insisted that he had. (Tr. 511–12).

Defendant's mother, who was also at the hospital, pointed police to the people who had brought Defendant there. (Tr. 513, 517, 522–23). The police followed these people as they crossed the road in front of the hospital and

approached Defendant's black Ford Thunderbird. (Tr. 523–24). The group stopped near the car, bypassed it, and started down the sidewalk. (Tr. 525–26). As the officers approached him, Coleman reached into his pocket and threw down Rask's necklaces, ring, and watch; he also dropped a black .22 caliber handgun. (Tr. 528–30, 534–35). The gun had one live round in it, but was missing its magazine and magazine release lever. (Tr. 535–36, 590). Without this lever and a magazine, the gun would fire only one bullet at a time. (Tr. 540–41).

Inside Defendant's car, police found a silver .25 caliber semi-automatic handgun wedged between the passenger seat and console.[4] (Tr. 514–15). A black hoodie was also found in Defendant's trunk, and victim Stallis's cell phone was found in the pocket. (Tr. 515–16).

During the retrial for sentencing following this Court's remand, Defendant presented "substantial evidence" in mitigation of punishment, including evidence of his "intellectual and emotional development, his family background, and his upbringing." (2nd L.F. 228; 2nd Tr. 606–993). Defendant also presented expert testimony regarding his below average intellectual

[4] Defendant's DNA was on the trigger grip and body of the silver .25 caliber gun. (Tr. 560–61).

functioning.[5] (2nd L.F. 228; 2nd Tr. 808–974). Other evidence included descriptions of Defendant's chaotic and abusive home life, his mother's crack addiction, and his father's physical abuse. (2nd L.F. 229).

After the jury could not unanimously agree to impose a life-without-parole sentence for first-degree murder, the circuit court, following the procedures outlined by this Court in *State v. Hart*,[6] vacated the guilty verdict on that charge and entered a finding of guilt for second-degree murder. (2nd L.F. 224). The jury recommended a sentence of life imprisonment for second-degree murder, 30 years for first-degree robbery, 15 years for kidnapping, and life imprisonment on each of the three counts of armed criminal action. (2nd L.F. 224–25). The court later imposed the jury-recommended sentences and ordered that these sentences run consecutively to each other and the

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[5] Other information in the record suggests Defendant's intelligence was not below average. The "Social Investigation For Certification Hearing," which Defendant has filed with this Court (Petitioner's Ex. 1), stated that when Defendant attended "school, he would receive good grades." This observation was confirmed in the report prepared by Alternative Sentencing & Mitigation, also filed with this Court by Defendant, which reported that Defendant received good grades and was a "bright kid, academically."

[6] *State v. Hart*, 404 S.W.3d 232 (Mo. banc 2013).

previously imposed sentences, except that the sentences for the armed-criminal-action counts were ordered to run concurrently to their associated charge. (2nd L.F. 240–46).

ARGUMENT

I (cruel-and-unusual punishment).

The imposition of consecutive sentences for second-degree murder and a dozen other multiple, violent nonhomicide offenses (assault, robbery, kidnapping, and burglary) did not violate the Eighth Amendment as interpreted in *Graham v. Florida* and *Miller v. Alabama* because: (1) *Graham* dealt only with the imposition of a life-without-parole sentence for a single nonhomicide offense; (2) the Court in *Graham* expressly distinguished that case from one involving a juvenile who had also committed a homicide offense; (3) *Miller* does not apply because Defendant did not receive a statutorily mandated sentence of life without parole; (4) and Defendant has not shown that imposing consecutive sentences on a juvenile offender who has committed multiple, violent felonies, including a homicide offense, violates the Eighth Amendment.

Alternatively, even if Defendant's 300-year sentence, which he suggests makes him parole eligible in his 80s, is considered the functional equivalent of a life-without-parole sentence, it is still not unconstitutional under *Miller* because Defendant had the opportunity to present mitigation evidence during a sentencing hearing, and the trial court considered that evidence before deciding

that consecutive sentences were appropriate under the circumstances of this case.

A. The record regarding this claim.

In his first direct appeal to this Court, the only sentence Defendant challenged was the mandatory life-without-parole sentence for first-degree murder. *See Nathan*, 404 S.W.3d at 271 n.12. This Court noted that Defendant had not challenged, in either the trial or the appellate court, the sentences that were imposed for the 21 remaining nonhomicide offenses following Defendant's waiver of jury sentencing. *Id.* For those offenses, the court had sentenced Defendant to life imprisonment on each of the 6 counts of first-degree assault and first-degree robbery, 15 years on each of the five counts of kidnapping, 15 years for first-degree burglary (1 count), and life imprisonment on each of the 11 counts of armed criminal action. (Tr. 977–78, 996–1004; L.F. 262–70; 2nd L.F. 212). Those sentences were ordered to run consecutively, except for the life sentences imposed on the armed-criminal-action counts, which were ordered to run concurrently with their associated charges. (Tr. 977–78, 996–1004; L.F. 262–70; 2nd L.F. 212).

After this Court set aside Defendant's statutorily mandated sentence of life without parole for first-degree murder and reversed the trial court's dismissal of the counts pertaining to victim Whitrock (Counts IX, X, XXXIII, and XXIV), the trial court presided over a resentencing proceeding before a

jury. (2nd L.F. 224). When the jury was unable to unanimously agree that Defendant should be sentenced to life without parole for first-degree murder, the trial court, in accordance with this Court's holdings in *Hart* and *Nathan*, set aside the original jury's guilty verdict for first-degree murder and entered a conviction for second-degree murder. (2nd L.F. 224–25; 2nd Tr. 1053–54). The jury recommended a maximum sentence of life imprisonment for second-degree murder involving victim Stallis, and it also recommended maximum sentences of 30 years for first-degree robbery, 15 years for kidnapping, and life imprisonment on the 2 associated counts of armed criminal action involving victim Whitrock. (2nd L.F. 224–25).

Before being formally sentenced, Defendant filed a motion for new trial and for resentencing on all the nonhomicide counts on the ground that the consecutive sentences were the "equivalent" of life without parole sentences and thus unconstitutional under *Miller v. Alabama* and *Graham v. Florida*. (2nd L.F. 190–92). In rejecting Defendant's constitutional claims, the trial court ruled that the Eighth Amendment as interpreted in *Miller* and *Graham* did not preclude the consecutive sentences previously imposed on the nonhomicide counts, nor did it preclude the imposition of additional consecutive sentences on the second-degree murder charge and the remaining nonhomicide (Whitrock) offenses for which Defendant was yet to be sentenced. (2nd L.F. 229–36). The court also considered the evidence

presented at the first trial and the victim-impact and mitigation evidence presented during Defendant's resentencing proceeding in determining whether to impose consecutive sentences. (2nd L.F. 227–36).

The court began by noting that Defendant's original jury found that he had deliberated in Stallis's murder and was thus guilty of first-degree murder.[7] It also noted that Defendant was armed and threatened to kill one or more victims, that he attempted to aid Coleman while Officer Lovadina was being shot, that he fled the scene and attempted to dispose of evidence, and that his overall participation in the crimes was "active and substantial." (2nd L.F. 228). The court also considered the mitigation evidence presented during the resentencing proceeding, which included Defendant's below average intellectual functioning and his chaotic and abusive home life. (2nd L.F. 228–29).

The court then imposed the jury-recommended sentences of life imprisonment for second-degree murder, 30 years for first-degree robbery, 15 years for kidnapping, and life imprisonment for the associated armed-criminal-action counts. (2nd L.F. 240–46: 2nd Tr. 1082–83). The court ordered that these sentences run consecutively to each other and the previously

[7] This Court found that the evidence was sufficient to support Defendant's first-degree murder conviction. *See Nathan*, 404 S.W.3d at 264–68.

imposed sentences, except that the life sentences for armed criminal action were ordered to run concurrently with their associated underlying charge. (2nd L.F. 240–46; 2nd Tr. 1082–83). The court explained the appropriateness of consecutive sentences by noting that Defendant's participation in the crimes was "active and direct" and that he did not suffer from any mental disease or defect that diminished his criminal responsibility. (2nd L.F. 234–35).

The following chart shows the offenses (identified by victim) for which Defendant was found guilty and the sentences he received:

Count	Charge	Sentence
I	2nd degree murder (Stallis)	Life
II	ACA (Stallis)	Life, concurrent with Count I
III	1st degree assault (Lovadina)	Life, consecutive to Counts I & II
IV	ACA (Lovadina)	Life, concurrent with Count III and consecutive to Counts I & II
V	1st degree assault (Koenig)	Life consecutive to Counts I-IV
VI	ACA (Koenig)	Life, concurrent with Count V and consecutive to Counts I-IV
VII	1st degree robbery (Koenig)	Life, consecutive to Counts I-VI
VIII	ACA (Koenig)	Life, concurrent with Count VII and consecutive to Counts I-VI
IX	1st degree robbery (Whitrock)	30 years, consecutive to Counts I-VIII
X	ACA (Whitrock)	Life, concurrent with Count IX and consecutive to Counts I-VIII
XI	1st degree robbery (Stallis)	Life, consecutive to Counts I-X
XII	ACA (Stallis)	Life, concurrent with Count XI and consecutive to Counts I-X
XIII	1st degree robbery (Rask)	Life, consecutive to Counts I-XII
XIV	ACA (Rask)	Life, concurrent with Count XIII and consecutive to Counts I-XII
XV	1st degree burglary	15 years, consecutive to Counts I-XIV

XVI	ACA	Life, concurrent with Count XV and consecutive to Counts I-XIV
XVII	Kidnapping (Lovadina)	15 years, consecutive to Counts I-XVI
XVIII	ACA (Lovadina)	Life, concurrent with Count XVII and consecutive to Counts I-XVI
XIX	Kidnapping (Koenig)	15 years, consecutive to Counts I-XVIII
XX	ACA (Koenig)	Life, concurrent with Count XIX and consecutive to Counts I-XVIII
XXI	Kidnapping (Stallis)	15 years, consecutive to Counts I-XX
XXII	ACA (Stallis)	Life, concurrent with Count XXI and consecutive to Counts I-XX
XXIII	Kidnapping (Whitrock)	15 years, consecutive to Counts I-XXII
XXIV	ACA (Whitrock)	Life, concurrent with Count XXIII and consecutive to Counts I-XXII
XXV	Kidnapping (Rask)	15 years, consecutive to Counts I-XXIV
XXVI	ACA (Rask)	Life, concurrent with Count XXV and consecutive to Counts I-XXIV

(2nd L.F. 29–36, 240–46).

B. Defendant cannot lawfully challenge the individual sentences for the convictions that are final judgments.

Although his point relied on does not specifically challenge the sentences imposed for the 21 nonhomicide (non-Whitrock) offenses that the trial court previously imposed following his 2011 trial, Defendant could not otherwise

lawfully do so.[8] This Court expressly noted that Defendant had not appealed those nonhomicide convictions or the sentences imposed for those offenses. *Nathan*, 404 S.W.3d at 271 n.12. The judgment in a criminal case is final when judgment and sentence is entered. *See State v. Chapman*, 704 S.W.2d 674, 675 (Mo. App. S.D. 1986). Under Rule 29.13, the circuit court has only 30 days to set aside a judgment and order a new trial and only on specified grounds. Defendant has asserted none of those grounds, and even if he had, well more than 30 days have passed since the entry of his sentence and judgment on those counts. Moreover, Defendant repeatedly and vigorously argued at his resentencing that the judgment and sentences for those convictions were "final judgments." (2nd Tr. 264–65, 1009). Just before opening statements, the State made a motion in limine to prevent the defense from mentioning the sentences Defendant received in the previous trial. (2nd Tr. 264). Defendant responded that the convictions and sentences for these offenses were "final judgments" and the defense should be allowed to mention these sentences to the jury. (2nd Tr. 264–65).

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[8] Defendant also does not appear to challenge the individual sentences imposed for the second-degree-murder charge and the Whitrock offenses. His point relied on challenges only the combined effect of those sentences under the Eighth Amendment. Deft's Brief, p. 34.

In his previous appeal, Defendant argued for the first time that he should be resentenced not only on the first-degree murder charge, but also on all the other counts for which he had already been sentenced. *Nathan*, 404 S.W.3d at 271 n.12. This Court noted that Defendant had not appealed those convictions, had not argued in the trial court that "any one of the sentences for the nonhomicide crimes (or the combined effect of all of those sentences) was unlawful or unconstitutional," and had not asserted such a claim in any point relied on. *Id.* Defendant cannot now challenge the individual sentences rendered in those final judgments. Defendant's Eighth Amendment challenge regarding the combined effect of these final sentences appears to be encompassed within footnote 12 of this Court's opinion in Defendant's first direct appeal. *Id.*

C. Standard of review.

"Whether a defendant's constitutional rights were violated is a question of law reviewed de novo." *State v. Aaron*, 218 S.W.3d 501, 506 (Mo. App. W.D. 2007).

D. Defendant's consecutive sentences do not violate the Eighth Amendment.

Defendant contends that his consecutive sentences totaling 300 years violate the Eighth Amendment under *Graham v. Florida* and *Miller v. Alabama*. The relevant consideration under those cases was not the

aggregate number of years encompassed by a sentence, but whether the juvenile defendant was eligible for parole consideration. Defendant does not contend that he is ineligible for parole; he simply assumes that any eligibility date will exceed his natural life and thus be the "equivalent" of life without parole. Yet the record contains nothing showing when Defendant will be parole eligible. Defendant relies on a comment by the circuit court judge that he will have to serve 63.75 years before being eligible for parole. Deft's Brief, p. 39. (2nd L.F. 234). Section 558.019 provides that "[a]ny sentence either alone or in the aggregate with other consecutive sentences for crimes committed at or near the same time which is over seventy-five years shall be calculated to be seventy-five years." Section 558.019.4(1) and (2), RSMo Cum. Supp. 2013. Although Defendant's sentences for ACA are excluded from this provision, *see* section 558.019.1, the Department of Corrections has promulgated a rule for determining the parole eligibility for offenders serving multiple consecutive sentences totaling 45 years or more. *See* 14 CSR 80-2.010(1)(E).[9] Consequently, while the record does not definitively establish

[9] "Offenders serving life or multiple concurrent or consecutive life sentences and offenders with sentences totaling forty-five (45) years or more are eligible for parole after a minimum of fifteen (15) years has been served, except where statute would require more time to be served."

when Defendant will be eligible for parole, for purposes of this constitutional inquiry, it may be assumed that, absent a change in the law, this date will not occur until Defendant is in his 80s.

Defendant contends that his consecutive sentences should be set aside because they are contrary to *Graham v. Florida*, 560 U.S. 48 (2010), which prohibits the imposition of life-without-parole sentences for juveniles committing a nonhomicide offense, and to the reasoning enunciated in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which prohibits imposition of a statutorily mandated sentence of life without parole and requires a sentencer to consider the juvenile's youth and attendant circumstances before imposing a life-without-parole sentence for a homicide offense. Defendant's sentence is not unconstitutional under the holding of either case. Moreover, Defendant has failed to demonstrate that a national consensus exists against the imposition of consecutive sentences on juvenile offenders committing multiple violent felonies, including murder, or that the sentences imposed in this case were contrary to evolving standards of decency.

1. *Graham* does not apply because Defendant committed numerous violent felonies, including murder.

In *Graham v. Florida*, the defendant, who was 16 years old when he committed his crime, was given what amounted to a sentence of life without

parole based on his guilty plea to a single count of "armed burglary."[10] *Graham*, 560 U.S. at 53–58. In striking down this sentence, the Court held that the Eighth Amendment prohibits the imposition of a life-without-parole sentence on a juvenile who commits a *nonhomicide* offense. *Id.* at 74 ("This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole."). It further stated that this holding represented a "clear line" to prevent imposition of life-without-parole sentences on "juvenile nonhomicide offenders." *Id.* The Court also noted that its decision "concerns only those juvenile offenders sentenced to life without parole *solely* for a nonhomicide offense." *Id.* at 63 (emphasis added).

In explaining why its holding was limited to juveniles committing *nonhomicide* offenses, the Court stated that "an offense like robbery or rape is a 'serious crime deserving serious punishment,' [but] those crimes differ from homicide in a moral sense." *Id.* at 69 (quoting *Enmund v. Florida*, 458

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[10] The defendant was actually sentenced to life imprisonment on this charge, but since Florida had abolished its parole system, the life sentence gave the defendant no possibility of release, except for executive clemency. *Id.* at 57. The defendant also received a 15-year sentence for attempted armed robbery stemming from the same incident. *Id.*

U.S. 782, 797 (1982)). This point was further reinforced by the Court's response to the State's argument that the purported number of juvenile offenders serving life-without-parole sentences for nonhomicide offenses was "inaccurate because it [did] not count juvenile offenders who were convicted of both a homicide and nonhomicide offense, even when the offender received a life without parole sentence for the nonhomicide." *Id.* at 62–63. The Court rejected that distinction as "unpersuasive" because a juvenile committing a homicide offense presented a "different situation," and the Court's holding concerned only offenders sentenced *solely* for a *nonhomicide* offense:

> It is difficult to say that a defendant who receives a life sentence on a nonhomicide offense but who was at the same time convicted of homicide is not in some sense being punished in part for the homicide when the judge makes the sentencing determination. The instant case concerns *only* those juvenile offenders sentenced to life without parole *solely* for a *nonhomicide* offense

Id. at 63 (emphasis added).

The Court also stressed that the Eighth Amendment's prohibition on imposing a sentence of life *without* parole on a juvenile offender did not mean that these offenders must be released during their "natural lives." *Id.* at 75. In other words, the Eighth Amendment forbids a state from determining at

"the outset" that a juvenile nonhomicide offender will serve his or her sentence without parole:

> It bears emphasis, however, that while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.

Id.

While it may be unconstitutional to impose a life-without-parole sentence on a juvenile offender for one count of armed burglary, it does not follow that a juvenile offender who commits multiple violent crimes at some point becomes immune to additional punishment for these multiple offenses. *See Bunch v. Smith*, 685 F.3d 546, 550 (6th Cir. 2012) (*Graham* "did not clearly establish that consecutive fixed-term sentences for juveniles who commit nonhomicide felonies are unconstitutional when they amount to the practical equivalent of life without parole"). *See also Graham*, 560 U.S. at 124 (Alito, J.

dissenting) (observing that the Court's holding precluded a life-without-parole sentence for a nonhomicide offense but did not apply to "the imposition of a sentence to a term of years without the possibility of parole").

The Court of Appeals has rejected the argument that *Graham* precludes imposition of consecutive sentences or an extended prison term on a juvenile offender solely for multiple nonhomicide offenses. In *State v. Denzmore*, 436 S.W.3d 635 (Mo. App. E.D. 2014), the court found no Eighth Amendment violation when the trial court imposed an aggregate sentence of 44 years on a juvenile offender who was 17 when he committed the crimes of first-degree robbery, kidnapping, armed criminal action, resisting arrest, and leaving the scene of an accident. *Id.* at 638, 644–45. The court rejected the argument that this sentence constituted a "*de facto* sentence" of life imprisonment. *Id.* at 645. *See also Glover v. State*, 477 S.W.3d 68, 75 (Mo. App. E.D. 2015) (holding that it "is well-established that the trial court retains discretion to order consecutive or concurrent sentences" and that "the consecutive effect of those sentences does not constitute cruel and unusual punishment"); *State v. Mubarak*, 163 S.W.3d 624, 631 (Mo. App. S.D. 2005) ("When the sentence imposed is within the range prescribed by statute, it cannot be judged excessive, and the consecutive effect of the sentences does not constitute cruel and unusual punishment.").

Courts in other jurisdictions have reached similar holdings. These courts have held that *Graham* does not preclude imposition of consecutive or aggregate sentences of less than life without parole on juvenile offenders committing multiple nonhomicide offenses. *See State v. Kasic*, 265 P.3d 410, 415 (Ariz. App. 2011) (holding that a combined 139.75-year sentence for a juvenile defendant who committed nonhomicide offenses was constitutional); *State v. Brown*, 118 So.3d 332 (La. 2013) (holding that *Graham* "applies only to sentences of life in prison without parole" and not "to a sentence of years without the possibility of parole" and determining that the juvenile offender's 70-year sentence, which equaled or exceeded his life expectancy, for nonhomicide offenses was constitutional); *Middleton v. State*, 721 S.E.2d 111 (Ga. App. 2012) (holding that a 30-year sentence without parole imposed on a juvenile who was 14 years old when he committed his nonhomicide offenses did not violate *Graham* because it was not a sentence of life without parole); *Vasquez v. Commonwealth*, 781 S.E.2d 920, 924–28 (Va. 2016) (upholding the juvenile defendants' respective aggregate sentences for multiple nonhomicide offenses that required "active incarceration" of 133 and 68 years and holding that "*Graham* does not apply to aggregate term-of-years sentences involving multiple crimes").

Other less-persuasive opinions purport to extend the holding in *Graham* by striking down aggregate sentences for nonhomicide offenses that are

deemed as the equivalent of a life-without-parole sentence. *See People v. Caballero*, 282 P.3d 291 (Cal. 2012) (holding that the juvenile defendant's total sentence of 110-ten years to life solely for nonhomicide offenses was unconstitutional under *Graham*); *Henry v. State*, 175 So.3d 675 (Fla. 2015) (holding that a juvenile offender's aggregate sentence of 90 years solely for nonhomicide offenses, which required imprisonment until the age of 95, violated the Eighth Amendment under *Graham* because the sentence required imprisonment until the age of 95 and did not afford the defendant a "meaningful opportunity to obtain future early release during [his] natural [life]"); *Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013) (holding that the juvenile defendant's 254-year sentence, half of which must be served before being eligible for parole, based on convictions for 24 violent felonies committed with a gun against 4 separate women over a 5-week period was unconstitutional under *Graham*).

Ultimately, however, Defendant's claim is without merit because he was not only sentenced for multiple nonhomicide offenses, but also for a homicide offense that he committed while perpetrating the other crimes. Defendant's sentence is thus not unconstitutional under the holdings in either *Graham* or *Miller*. Consequently, contrary to Defendant's argument, *Graham* cannot be applied in a vacuum while parsing the nonhomicide offenses from a homicide

offense committed at the same time. The Supreme Court essentially rejected such an argument in explaining its holding in *Graham*.

2. *Miller* does not apply because no statutorily mandated sentence of life without parole was imposed and the sentencer considered Defendant's mitigation evidence.

Defendant also argues that his sentence violates *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which precludes a statutorily mandated sentence of life without parole and requires a sentencer to consider the juvenile's youth and attendant circumstances before imposing a life-without-parole sentence for a homicide offense. But the constitutional requirement created in *Miller* applies only when consideration is being given to sentencing a juvenile found guilty of murder to life without parole, the harshest penalty constitutionally available. *Id.* at 2469 (holding that a sentencing scheme that mandates life in prison without parole is unconstitutional because it makes the offender's youth "irrelevant to imposition of that *harshest* prison sentence") (emphasis added); *Id.* at 2475 (explaining that "*Graham*, *Roper*, and our individualize sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the *harshest possible penalty*").

Here, the jury chose not to sentence Defendant to the "harshest" punishment. Thus *Miller* does not apply to Defendant's constitutional claim.

Although the jury in this case, which had the opportunity to consider Defendant's mitigating circumstances, chose not to impose a life-without-parole sentence on Defendant, it nevertheless recommended the maximum sentences available for second-degree murder and the Whitrock offenses.

The trial court also heard this mitigation evidence, which Defendant chose not to present during his first trial. After hearing this evidence, the trial court reconsidered whether to impose consecutive sentences and concluded that consecutive sentences were warranted under the circumstances of Defendant's case. "Trial courts have very broad discretion in their sentencing function." *Glover*, 477 S.W.3d at 75. Moreover, it "is well-established that the trial court retains discretion to order consecutive or concurrent sentences." *Id. See also State v. Atkeson*, 255 S.W.3d 8, 11 (Mo. App. S.D. 2008) (holding that the decision about "whether to impose concurrent or consecutive sentences lies within the discretion of the trial court"); *See also Oregon v. Ice*, 555 U.S. 160 (2009) (holding that the common-law tradition that gives judges the "unfettered discretion" to determine "whether sentences for discrete offenses shall be served consecutively or concurrently," was part of the States' authority over their criminal justice systems and that this practice did not violate the Sixth Amendment); section 558.036.1, RSMo Cum. Supp. 2013 ("Upon a finding of guilt upon verdict or plea, the court shall decide the extent or duration of sentence or other disposition to be imposed under all the

circumstances, having regard to the nature and circumstances of the offense and the history and character of the defendant and render judgment accordingly."); section 558.026.1, RSMo Cum. Supp. 2013 ("Multiple sentences of imprisonment shall run concurrently unless the court specifies that they shall run consecutively"); Rule 29.09 ("The court, when pronouncing sentence, shall state whether the sentence shall run consecutively to or concurrently with sentences on one or more offenses for which defendant has been previously sentenced").

Consequently, even if it is assumed that Defendant's consecutive sentences are the equivalent of a life-without-parole sentence because he will not be eligible for parole until after he turns 80 years old, the imposition of such a sentence does not violate *Miller* because his sentencer considered Defendant's mitigating circumstances and took those circumstances into account before deciding to impose consecutive sentences. This is all *Miller* requires. Missouri law commits these sentencing decisions to the discretion of the trial court, and the trial court exercised its discretion within the limits of the Eighth Amendment as interpreted by *Miller* by considering Defendant's youth and attendant circumstances, including mitigating evidence, before imposing consecutive sentences.

Defendant supports his Eighth Amendment claim by relying on *State v. Ragland*, 836 N.W.2d 107, 121 (Iowa 2013), in which a juvenile defendant

was convicted of first-degree murder and received a statutorily mandated sentence of life without parole. *Id.* at 110. After *Miller v. Alabama* was handed down, the governor of Iowa commuted the Defendant's life-without-parole sentence to life imprisonment with no possibility for parole for 60 years. *Id.* at 110–11. The Iowa Supreme Court held that this commuted sentence was still the "functional equivalent" of a mandatory sentence of life without parole because the defendant would not be eligible for parole until he was 78.6 years old. *Id.* at 119–22. The court determined that *Miller* applied retroactively and remanded the case to the trial court for an "individualized sentencing hearing" under *Miller*. *Id.*

Ragland is inapposite here because Defendant received an "individualized sentencing hearing" under this Court's remand order before his sentence was finally determined. Moreover, the Iowa court announced that it was applying the "spirit" behind the holdings in *Graham* and *Miller* in its extension of those cases to preclude any sentence that is the "practical equivalent" of a life-without-parole sentence.

Although Defendant attacks the sentencing decisions made by the trial-court judge and suggests that the court had "disdain" and "contempt" for controlling Supreme Court precedent and flouted those decisions by ordering the imposition of consecutive sentences, Defendant does not separately claim that the trial court abused its discretion in ordering consecutive sentences.

Instead, Defendant claims that the trial court's imposition of consecutive sentences which were the "practical equivalent" of a life-without-parole sentence violated Defendant's constitutional rights under the Eighth Amendment.

Defendant also complains that the trial court "prejudged" Defendant's sentence and that its actions gave the "appearance of unfairness" and demonstrated an inability to follow the law. Again, Defendant's point relied on does not assert that the trial judge was legally disqualified from presiding over Defendant's resentencing. It appears that these attacks on the integrity of the trial court are intended to bolster Defendant's constitutional claim. But the dictates of the Eighth Amendment apply to sentencing practices, not to the individual views and opinions of sentencing judges. In other words, the trial judge's views are not at issue, and those views, no matter how vehemently Defendant disagrees with them, cannot by themselves establish an Eighth Amendment violation. The issue is whether the imposition of consecutive sentences on a juvenile offender who has committed multiple, violent felonies, including murder, violates the Eighth Amendment.

Defendant's reliance on *State ex rel. McCulloch v. Drumm*, 984 S.W.2d 555 (Mo. App. E.D. 1999), is misplaced because the trial judge in that case expressly stated on the record that he denied the defendant's motion to waive a jury trial because he had already decided that the defendant was not guilty

by reason of mental disease or defect. *Id.* at 556. Even after the jury found the defendant guilty of first-degree murder, the trial judge made further comments during the sentencing hearing expressing his disagreement with the jury's verdict. *Id.* When the defendant's murder conviction was reversed on appeal and the case remanded for a new trial, this same trial judge refused to grant the State's motion for a change of judge for cause. *Id.* at 557. The court of appeals issued a writ of prohibition preventing the judge from presiding over the defendant's retrial on the ground that "a reasonable person could find an appearance of impropriety" since the judge had stated on the record that "he could not be objective" because he had already made up his mind that the defendant "suffered from a mental disease or defect based on the psychiatric reports filed in the case." *Id.* at 557–58. Defendant's case is plainly distinguishable.

Defendant supports his claim that the trial judge had prejudged his case before hearing any mitigation evidence by relying on a comment the judge made during Defendant's first sentencing hearing in 2011.[11] Deft's Brief, p.

[11] The comment relied on by Defendant was: "This Court believes that that future should be that you be permanently incapacitated from repeating this kind of behavior." (Tr. 995–96). The court made this comment immediately before announcing Defendant's sentence. (Tr. 995–96).

49–50. But the court made this comment after Defendant elected not to present any mitigation evidence at his first sentencing hearing because he was facing imposition of the statutorily mandated sentence of life without parole for first-degree murder. The court's comments during Defendant's resentencing proceeding, which were made after the court had heard extensive mitigation evidence and immediately before it announced Defendant's sentence, demonstrates that the court considered the mitigation evidence it had heard and acknowledged that it was bound by the United States Supreme Court decisions in exercising its discretion to impose consecutive sentences:

> Mr. Nathan, *I've considered your situation, and in light of all of the evidence, in light of the law, the Court is of course bound by the decisions of the Supreme Court of the United States*. As I indicated earlier, I've concluded that it is appropriate to impose consecutive sentences in this case.

(2nd Tr. 1082) (emphasis added).

3. Defendant has not shown that imposition of consecutive sentences for multiple, violent felonies, including a homicide, violates the Eighth Amendment.

Defendant contends that consecutive sentences imposed on juvenile offenders that are the "functional equivalent" of a life-without-parole

sentence violate the "consistency of direction" laid down in both *Miller* and *Graham*. But, as explained above, the holdings in *Miller* and *Graham* do not control the constitutional claim Defendant asserts in this case. Although Defendant does not expressly say it, what he is essentially arguing is that there is a national consensus against the imposition of consecutive sentences on a juvenile offender found guilty of multiple, violent felonies, including a homicide offense, when the aggregate effect of those sentences constitutes the "functional equivalent" of a sentence of life without parole. In other words, Defendant contends that evolving standards of decency demonstrate that this sentencing practice violates the Eighth Amendment. This argument may be rejected out of hand because Defendant has not made any attempt to apply the test used by the United States Supreme Court in making this Eighth Amendment inquiry.

The first problem with Defendant's proposed constitutional rule is the vagueness inherent in determining what is the "functional equivalent" of a sentence of life without parole. Defendant contends that since he is not parole eligible until he is 79 years old, this is the "functional equivalent" of a life without parole sentence. But the categorical bar Defendant proposes cannot be applied on a case-by-case basis. He offers no guidance, much less authority, for determining when consecutive sentences constitute the

"functional equivalent" of a life-without-parole sentence in any particular case.

An Eighth Amendment inquiry into whether a sentencing practice should be categorically barred "begins with objective indicia of national consensus," and the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Graham*, 560 U.S. at 62. But Defendant does not identify a single state that has barred the imposition of consecutive sentences on a juvenile offender convicted of multiple, violent offenses, including homicide, when those sentences operate as the "functional equivalent" of a life-without-parole sentence. He has not identified a single state that has barred consecutive sentences that exceed a juvenile offender's life expectancy or that push that juvenile offender's parole-eligibility date past a certain age. Nor does Defendant examine "actual sentencing practices" among various jurisdictions to demonstrate that the imposition of consecutive sentences on juvenile offenders who have committed multiple, violent felonies, including a homicide offense, is extremely rare. *Id.* at 62–63.

The reason Defendant has failed in this showing is likely because the decision whether to impose consecutive sentences is not usually mandated by

statute, but is committed to the sound discretion of the trial court.[12] Since a trial judge exercises the discretion to impose consecutive sentences following a sentencing hearing, during which a juvenile offender has had the opportunity to present mitigation evidence, no *Miller* violation occurs.

Finally, Defendant has also made no attempt to show that the "challenged sentencing practice" does not "serve[ ] legitimate penological goals, which is another factor the Supreme Court considers in considering "the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question." *Id.* at 67–71. Although Defendant suggests that this Court should follow the "analytical framework" of *State ex rel. Simmons v. Roper*, 112 S.W.3d 397 (Mo. banc 2003), in determining that the Eighth Amendment bars the challenged sentencing practice, it is telling that Defendant has not applied this framework to his constitutional claim. In *Simmons*, this Court considered whether a national consensus had developed against the juvenile death penalty and applied the methods identified above in determining whether that punishment violated the Eighth Amendment. Defendant makes no effort to do so here.

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[12] Section 558.026.1 requires sentences for certain sexual offenses to be imposed consecutively to other crimes committed at the same time, but that provision is not implicated in this case.

Defendant's sentences do not violate the Eighth Amendment, and his constitutional challenge to those sentences should be rejected.

II (alleged *Brady* violation).

Defendant has waived appellate review of his alleged *Brady* claim because he was aware of an allegedly late disclosure before trial and waited until after trial and the jury's verdict before bringing it to the court's attention.

A. The record regarding this claim.

After the jury in the guilt-phase trial found Defendant guilty on all counts, Defendant decided to waive jury sentencing. (L.F. 19). *See also Nathan*, 404 S.W.3d at 270 n.10. Defendant was sentenced to life without parole for first-degree murder and given multiple consecutive sentences for the 21 other nonhomicide offenses that the trial court had not dismissed. (L.F. 224).

In his previous direct appeal, Defendant argued for the first time on appeal that he should be resentenced not only on the first-degree murder charge, but also on all the other counts for which he had already been sentenced. *Id.* at 271 n.12. This Court noted that Defendant had not appealed those convictions and had not argued in the trial court that "any one of the sentences for the nonhomicide crimes (or the combined effect of all of those sentences) was unlawful or unconstitutional" and that he had not raised that claim on direct appeal. *Id.*

During jury selection in Defendant's most recent penalty-phase proceeding, defense counsel asked the jury panel members whether they

could consider evidence that Defendant was sexually or physically abused. (2nd Tr. 213–15).

After the jury was unable to unanimously agree that Defendant should be sentence to life without parole for first-degree murder, the trial court vacated Defendant's conviction for first-degree murder and entered a conviction for second-degree murder and further instructed the jury. (2nd L.F. 178; 2nd Tr. 1053–54). The jury then recommended a sentence of life imprisonment on the charge of second-degree murder involving victim Stallis, and it recommended the following sentences on the offenses related to victim Whitrock: 30 years for first-degree robbery, 15 years for kidnapping, and life imprisonment on the two counts of armed criminal action. (2nd L.F. 178; 2nd Tr. 1066–67).

Twelve days later, Defendant filed a motion asking for resentencing on the 21 counts for which Defendant had already been sentenced in the previous trial. (2nd L.F. 180–83). Defendant alleged that before the sentencing proceeding began, the State "provided discovery" of a December 23, 2009 investigation by St. Louis City police "into the sexual abuse of" Defendant, and that this investigation reported that Defendant had been raped and that Defendant's brother and cousin were in the bedroom when Defendant "awakened with his pants down and a sore anus." (2nd L.F. 181–82). Defendant alleged that this police report was not disclosed to Defendant's original trial counsel before Defendant waived his right to jury sentencing in

2011. (2nd L.F. 182). Defendant included this claim in his motion for new trial. (2nd L.F. 195–96).

The State responded that in April 2014 the defense made a discovery response to the State in which it provided records from the Missouri Department of Social Services pertaining to Defendant. (2nd L.F. 203). Included in those records was a "hotline" investigation into Defendant's disclosure of an alleged sexual abuse, which he made to a caseworker while being held in juvenile detention before he was certified to stand trial as an adult in this case. (2nd L.F. 203). After reviewing the voluminous records the defense had produced, the State attempted to locate the actual police report related to this disclosure. (2nd L.F. 203).

The State's response noted that the records the State produced to the defense showed that Defendant never reported to police that he was "raped." (2nd L.F. 203–04). Rather, Defendant reported that an uncle "teased" Defendant about having a small penis and that Defendant reported that he awoke one time to find his pants and underwear pulled down. (2nd L.F. 203–04). Defendant had no idea how his pants came to be pulled down, but that his cousin and a brother teased him that his teenaged uncle must have "raped" him. (2nd L.F. 203). Thus, the State responded, the statements Defendant made about being "raped" and having a sore anus were not statements he made to police, but were contained in other records the defense

had in its possession and which it produced to the State. (2nd L.F. 204). The State further responded that the defense was "clearly aware" from its possession of the Children's Division's records that a police investigation had taken place, and that the defense knew this information before it had turned those records over to the prosecution. (2nd L.F. 204).

In rejecting this claim, the trial court noted that the State had "belatedly disclosed a police report concerning possible sexual abuse of the defendant in 2009." (2nd L.F. 237). But the court stated that it had "no reason to doubt" the prosecution's representation that "the report came to their attention through Children's Division records supplied to them by the defense." (2nd L.F. 237). Since "the report contained information that would have related only to punishment, the failure to disclose it prior to the first trial surely worked no prejudice to Defendant, as he elected to waive jury sentencing for independent reasons."[13] The trial court found no violation of *Brady v.*

[13] The transcript in Defendant's first trial shows that after the jury was polled, Defendant's counsel informed the trial court that Defendant wished to waive jury sentencing. (Tr. 977). The court then explained to Defendant that he had the right to have the jury assess punishment within the range of punishment on all counts other than the first-degree murder charge. (Tr. 977–78). Defendant said that he still wanted to waive jury sentencing. (Tr.

Maryland because the information was not both unknown and favorable to the Defendant, nor material enough to undermine confidence in the trial's outcome. (L.F. 237). This was because the information in the belatedly disclosed police report was known to Defendant. (L.F. 237). Since Defendant had the police report and Children's Division records before the resentencing proceeding , and since there was no jury sentencing in the first trial, the court concluded that the belated disclosure worked no prejudice to Defendant. (L.F. 237).

B. This claim is not preserved for review and is otherwise without merit.

Defendant's claim is not preserved for appellate review. Although Defendant was by his own admission well aware of the non-disclosure of the police report before the resentencing proceeding, he did not object or assert a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). *See State v. Cook*, 339 S.W.3d 523, 527 (Mo. App. E.D. 2011). Instead, Defendant waited 12 days after the resentencing hearing had been held and the jury had rendered its verdict and been discharged before filing a motion seeking another

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977–78). After the court determined that Defendant's waiver was voluntary, it discharged the jury and scheduled a date for the sentencing hearing. (Tr. 978).

resentencing based on the non-disclosure of a police report that he knew had not been disclosed before the resentencing proceeding had even started.

Another ground for finding that Defendant's claim is waived is that Defendant was obviously aware of the police report before trial and instead chose not to assert a *Brady* claim until after trial was over. A defendant "cannot decide to gamble on a verdict, then reap the benefits of a new trial when the verdict is unfavorable." *State v. DeWitt*, 924 S.W.2d 568 (Mo. App. E.D. 1996). Similarly, "self-invited error cannot be the basis for overturning the judgment" in a criminal case. *State v. Hoy*, 219 S.W.3d 796, 811 (Mo. App. S.D. 2007).

Even if this claim may be reviewed, Defendant may receive only plain-error review of it. "To be entitled to reversal on a claim of plain error, a defendant bears the burden of demonstrating that the action of the trial court was not only erroneous, but that the error so substantially impacted upon his rights that manifest injustice or a miscarriage of justice will result if the error is left uncorrected." *Cook,* 339 S.W.3d at 527.

The record in this case shows no *Brady* violation occurred. "According to *Brady*, due process requires the prosecution to disclose evidence in its possession that is favorable to the accused and material to guilt or punishment." *Id.* "More importantly, *Brady* applies only to those situations where the defense discovers information after the trial that the prosecution

knew at the trial." *Id.*; *see also State v. Bynum*, 299 S.W.3d 52, 62 (Mo. App. E.D. 2009) (holding that "*Brady* applies only to those situations where the defense discovers information after trial that the prosecution knew at trial" and that if "the defendant had knowledge of the evidence at trial, the State cannot be faulted for nondisclosure").

Because Defendant had been provided the police report before the resentencing proceeding, no *Brady* violation occurred. *See Cook*, 339 S.W.3d at 527 (holding that when the defense knew before trial that a videotaped interview had occurred, no *Brady* violation occurred from the State's failure to produce the videotape before trial). In addition, this Court cannot assess whether, and to what extent, any *Brady* violation occurred since Defendant presented no evidence regarding the content of the police report or the content of the Children's Division records, which were in Defendant's possession for some unknown time before trial. *Id.* Defendant also presented no evidence regarding the circumstances of the alleged disclosure or his knowledge of the information before either trial. Although Defendant alleged that he would not have waived jury sentencing during the first trial if he had known of the sexual abuse allegedly mentioned in the police report, he presented neither evidence showing that any act of sexual abuse was identified in the report, nor the actual report over which this dispute is centered.

The State's response contained in the record shows that Defendant reported no act of sexual abuse to the police. Thus, Defendant's claim that he would not have waived jury sentencing if he had known about the sexual abuse, which was not contained in the police report, lacks any foundation. Moreover, from the information that is contained in the record, it does not appear that the trial court committed any error in determining that a police report that did not show that Defendant had reported any sexual abuse was material to the issue of punishment or could have had any impact on Defendant's decision to waive jury sentencing in the first trial. Finally, if anyone would have known whether Defendant had been sexually abused or had reported it to police, even before the first trial, it was Defendant. Consequently, since this information was obviously known to Defendant before either trial, there can be no *Brady* violation for the allegedly late disclosure.

The trial court did not err in rejecting this claim.

CONCLUSION

The trial court did not commit reversible error. Defendant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 10,266 words, excluding the cover, signature block, and this certificate, as determined by Microsoft Word 2010 software; and that a copy of this brief was sent through the electronic filing system on July 25, 2016, to:

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